Supreme Court, U.S
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No. _____

In The

Supreme Court of the United States

ELMER CRIDER, MARYLN CRIDER, LANNY HELMS, MARTHA HELMS, BRUCE GAMBELL, BRIAN MESSICK, LYNETTE MESSICK, GEORGE MALLON, NANCY MALLON, LARRY THOMPSON, and KAREN THOMPSON,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, RONALD K. STEWART in his official capacity as County Commissioner, PAUL DANISH in his official capacity as County Commissioner, CITY OF LOUISVILLE, THOMAS DAVIDSON in his official capacity as Mayor, CITY OF LAFAYETTE, CAROLYN McINTOSH in her official capacity as Mayor, CITY OF BROOMFIELD, and WILLIAM BERENS, in his official capacity as Mayor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What method should be used to determine whether parcels of land are "similarly situated" for equal protection purposes?

2. Is the determination of whether properties are "similarly situated" a question of fact or a question of law?

3. If the determination of whether properties are "similarly situated" is a question of fact, does a trial court err by not affording a plaintiff making an equal protection claim an opportunity to develop facts, through discovery or otherwise, sufficient to survive a motion for summary judgment?

LIST OF PARTIES

There are no parties to this case other than those disclosed in the caption. None of the parties are non-governmental corporations.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 11

I. THIS CASE OFFERS THE COURT A VEHICLE FOR CLARIFYING A VERY IMPORTANT, BUT HERETOFORE UNDEFINED, PRINCIPLE OF EQUAL PROTECTION LAW 11

II. THIS COURT SHOULD CLARIFY THAT THE SIMILARLY SITUATED DETERMINATION INVOLVES A QUESTION OF FACT THAT CANNOT BE DETERMINED IN THE CONTEXT OF A MOTION TO DISMISS 14

III. THE APPROACH TAKEN BY THE TENTH CIRCUIT CONFLICTS WITH THAT OF OTHER FEDERAL COURTS 18

IV. THE COURT SHOULD CORRECT AN INJUSTICE AND PERMIT THE PARADISE LANE OWNERS THE OPPORTUNITY TO PROVE AT TRIAL THAT THEY WERE SUBJECTED TO INTENTIONAL DISCRIMINATION 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Allegheny Pittsburgh Coal Co. v. County Comm'rs of Webster County, 488 U.S. 336 (1989) 11, 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 17

Bannum, Inc. v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992) 20

Berger v. City of Mayfield Heights, 154 F.3d 621 (6th Cir. 1998) 19

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 16

Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001) 19

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 12

Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir. 1989) 18, 19

Equus Associates, Ltd. v. Town of Southampton, 37 F. Supp.2d 582 (E.D.N.Y. 1999) 19

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998) 19

Executive 100, Inc. v. Martin County, 922 F.2d 1536 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991) 20

Foucha v. Louisiana, 504 U.S. 71 (1992) 11

Graham v. Long Island Rail Road, 230 F.3d 34 (2d Cir. 2000) 19

TABLE OF AUTHORITIES – Continued

Page

Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton, 997 F. Supp. 340 (E.D.N.Y. 1998) 20

McKenzie v. City of White Hall, 112 F.3d 313 (8th Cir. 1997) 20

Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981) 12

New York State Club Assn. v. City of New York, 487 U.S. 1 (1988) 12, 13

Rostker v. Goldberg, 453 U.S. 57 (1981) 12

Schumway v. United Parcel Service, 118 F.3d 60 (2d Cir. 1997) 19

Smith v. Monsanto Chemical Co., 770 F.2d 719 (8th Cir. 1985) 18

Sullivan Properties, Inc. v. City of Winter Springs, 899 F. Supp. 587 (M.D. Fla. 1995) 21

United States v. Armstrong, 517 U.S. 456 (1996) 11

United States v. Castillo, 140 F.3d 874 (10th Cir. 1998) 5, 6, 7

Village of Willowbrook v. Olech, 120 S. Ct. 1073 (2000) 7, 11, 21

Williams v. Vermont, 472 U.S. 14 (1985) 12, 13

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1367 5

28 U.S.C. § 2403 4

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Civ. P. 12(b)(6) 15

Fed. R. Civ. P. 56 ..... 16, 17

Sup. Ct. R. 13 1

Sup. Ct. R. 29.4(c) 4

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 246 F.3d 1285. It appears at 1a through 10a of this petition. The opinion of the United States District Court for the District of Colorado was handed down in open court. A copy of the transcript of the hearing at which the court's decision was rendered appears at 11a through 46a of this petition.

JURISDICTION

The judgment and the Tenth Circuit's opinion were handed down the same day, April 18, 2001. Petitioners did not seek rehearing. No extension of time has been sought to file this petition. Jurisdiction in this Court is proper under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides, in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners (hereinafter the "Paradise Lane Owners") own 70 acres of an 80-acre parcel of land in unincorporated Boulder County, Colorado, which is known as Paradise Lane.[1] Paradise Lane's 80 acres were originally divided into 10-acre lots in 1972 and settled as a rural, agricultural area. There are five residences on the parcel. Three of the 10-acre lots are undeveloped.

Immediately to the south of Paradise Lane is an 80-acre farm. All 80 acres of the farm, up to this point, are presently undeveloped. In 1993 or 1994, the farm was purchased by a corporation, Storage Technology Corporation ("StorageTek"). Paradise Lane and StorageTek's 80 acres together form a 160-acre, postage-stamp parcel of land surrounded on three sides by the City of Louisville and on the fourth side by property owned by Lousiville. Paradise Lane and StorageTek's farm are both presently zoned agricultural and are both in unincorporated Boulder County.

In 1998, the Paradise Lane Owners wrote a letter to officials of the City of Louisville seeking annexation into Louisville. Louisville officials did not respond to the Paradise Lane Owners. One of the Paradise Lane Owners contacted one official for Louisville who told that Owner that Louisville would like a letter from all of the Paradise Lane Owners expressing willingness to be annexed before

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[1] The facts are taken from the allegations in the Complaint, below. They must be deemed as true given that the lower court action for which review is sought in this Court was a dismissal of the Complaint by the district court and affirmance of that dismissal by the Tenth Circuit.

consideration of the Paradise Lane Owners' request. Such a letter was in fact sent on August 31, 1998.

Again, Louisville officials did not respond. In subsequent attempts by one or more of the Paradise Lane Owners to learn of the status of their annexation efforts, they were told that they would have to wait until certain, unspecified issues could be resolved related to construction of a new highway in their area.

Unbeknownst to the Paradise Lane Owners, at the same time, the City of Louisville was negotiating an Intergovernmental Agreement ("IGA") with the County of Boulder and the cities of Lafayette and Broomfield involving a comprehensive set of land use issues stemming from development of a major "beltway-like" section of highway in the area. A major component of these negotiations involved demands made by Boulder County that a certain amount of open space be set aside by designating certain lands in the area as "rural preservation" before it would agree to construction of the highway. As part of the deal, the four governmental entities agreed to place Paradise Lane in "rural preservation" for 30 years, along with an express prohibition that Paradise Lane cannot be annexed by any of the cities for that same period of time.

During negotiations, and while the Paradise Lane Owners were being kept in the dark about what was happening to them, one or more officials from Louisville contacted representatives of StorageTek to discuss whether StorageTek would object to having its 80-acre farm placed in "rural preservation." StorageTek informed

the Louisville officials that StorageTek did object to having its 80-acre farm so "preserved."

When the IGA was announced, the Paradise Lane Owners attended a public hearing before the Boulder County Commissioners to object to having their land placed in "rural preservation" but not StorageTek's. Boulder County agreed to two small modifications to the IGA,[2] however, the Paradise Lane Owners' attempt to have the "rural preservation" designation of their property removed was rejected. Significantly, one of the commissioners remarked at the hearing that if he had had his way during the negotiations, StorageTek's farm would also have received the "rural preservation" designation.

The Paradise Lane Owners sued the four governmental signators to the IGA (hereinafter "local government defendants"), bringing an equal protection claim, a substantive due process claim, an as-applied constitutional challenge to a state statute authorizing local governments to enter into intergovernmental agreements,[3] and a state-law claim based upon Colorado's Constitution – a claim for which the Paradise Lane Owners sought an

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[2] First, Louisville is supposed to use its "best efforts" to secure a "buffer" between StorageTek's farm and Paradise Lane when StorageTek's farm is developed. Second, the Paradise Lane owners would be permitted to double their density (two houses per 10-acre lot) but ***only*** if the Paradise Lane Owners agreed to convey a permanent conservation easement in return for such increased density.

[3] The district court certified that a state statute had been challenged on constitutional grounds under 28 U.S.C. § 2403. The constitutionality of that statute is not now before this Court, and, accordingly, no notice is required under Sup. Ct. R. 29.4(c).

exercise of supplemental jurisdiction under 28 U.S.C. § 1367.

The local government defendants moved to dismiss the federal claims and asked the district court to decline exercise of supplemental jurisdiction over the state-law claim. Before the district court, and concerning the equal protection claim only,[4] the local government defendants argued, *inter alia*, that StorageTek's farm was not similarly situated to Paradise Lane because StorageTek's farm was owned by a corporation, and that the local government defendants could rightly seek to encourage StorageTek to remain in the area by allowing it to expand its operations if it chose to do so. The local government defendants also relied heavily on a Tenth Circuit case, *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998) (upholding facial challenge of Fed. R. Crim. Evid. 414), for the proposition that no equal protection claim could stand if the local government defendants could proffer ***any*** explanation for the differential treatment. *See* 14a, 17a-19a.

The Paradise Lane Owners, in response: (1) cited a number of equal protection cases in the land use area handed down by other federal courts and argued that these cases were far more authoritative than *Castillo*; (2) argued that deference to the local government's actions should be tempered by the Paradise Lane Owners' allegations of intentional misconduct in deceiving them while, at the same time, communicating with StorageTek; and

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[4] The Paradise Lane Owners will limit their discussion, to the extent possible, to the equal protection claim – the only claim for which review is sought on certiorari.

(3) stressed the intentional, flagrant differential treatment between StorageTek's farm and Paradise Lane spelled out in the text of the IGA itself. 22a-35a.[5]

The district court granted the local government defendants' motion. Concerning the equal protection claim, the district court found *Castillo* persuasive and rejected the equal protection cases cited by the Paradise Lane Owners from other federal circuits:

> Now many cases have been cited which are not Tenth Circuit cases; but we do have Tenth

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[5] The "Text Portion" of the IGA contains the following two paragraphs:

> 4.16 Parcels numbered [describing Paradise Lane] (a total of approximately 78 acres) on the attached map are currently unincorporated Boulder County and are designated Rural Preservation Area. Future Use [sic] shall be limited to agriculture and low density residential development. Boulder County agrees to consider approval of residential use with a density of no more than 1 unit per 4.5 acres on these parcels, provided that a perpetual conservation easement limiting development to no more than 1 unit per 4.5 acres is secured as part of the approval of the new density.
>
> 4.17 A parcel numbered [describing Storage Technology's property] (80 acres) on the attached map is currently unincorporated Boulder County. If and when annexed to the City of Louisville, Louisville shall use its best efforts in good faith to require an undeveloped buffer along the northern side of said parcel. The parties agree that only Louisville can annex this property.

IGA at 18; Aplt. App. 114.

> Circuit law here. And even though certainly *U.S. vs. Castillo* – and let me put that cite on the record: 140 F.3d 874 – did deal with a rule of evidence and with a congressional enactment, there is a very clear principle stated in that case for the rational basis test. We cannot go to Florida or the Eastern District of New York or other circuits because we have law right here in the Tenth Circuit.

38a-39a. The district court found that the local government defendants had proffered "plausible" reasons for the differential treatment afforded the two properties under *Castillo*. 39a. Furthermore, the district court found that StorageTek's farm and Paradise Lane were not similarly situated:

> And the Court would have to say that I think there is sufficient distinction that has been argued between the plaintiffs' property and StorageTek. StorageTek is an employer of many people in the area. They may have need for expansion. Their land is undeveloped, so on, and so forth.

Ibid.

The Paradise Lane Owners appealed. Relying upon the same lower federal court decisions cited below and the then recent opinion by this Court in *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000), the Paradise Lane Owners argued that they had adequately pled intentional arbitrary discrimination under *Olech*. As argued to the Tenth Circuit:

> The essential core of the Paradise Lane Owners' equal protection claim is that one or more parties to the IGA deceived the Paradise

> Lane Owners as to what was taking place when the IGA was being negotiated, while, at the same time, one of the parties to the IGA, Defendant Louisville, approached StorageTek to obtain StorageTek's approval to have its 80 acres also placed in "Rural Preservation." *Complaint* ¶¶ 65-69, 73-78. StorageTek objected to having its land placed in "Rural Preservation," and Louisville, in turn, negotiated with the other parties to the IGA to have StorageTek's property excluded from "Rural Preservation" while the preservation designation on Paradise Lane remained. *Id.* at ¶¶ 79-81.

Appellants' Reply Brief at 6. The Paradise Lane Owners stressed that whether the two properties were similarly situated was a question of fact, not of law, *Appellants' Opening Brief* at 28; *Appellants' Reply Brief* at 9, and observed that at the motion-to-dismiss phase of the proceedings, they had easily satisfied their burden:

> In response to the Paradise Lane Owners' showing in their *Opening Brief*, the Defendants supplied their own conclusory allegation that "the Complaint is deficient because it does not contain allegations which show that the Subdivision Properties were similarly situated." This conclusory statement is belied by the *Complaint* itself. In it, the Paradise Lane Owners allege that Paradise Lane and StorageTek's property are both 80-acre rectangular parcels, that are immediately adjacent to one another, that are identically zoned, that are both in unincorporated Boulder County, and that, together, constitute a 160-acre parcel of land that is surrounded on three sides by the City of Louisville and on the fourth side by property owned by Louisville. *Complaint* ¶¶ 21, 98, 99. *See* Aplt. App. at 183 (a

> Boulder County map showing 160-acre parcel of combined land in unincorporated Boulder County). These specific factual allegations easily support the more general allegation that "Paradise Lane and Storage Technology's North 80 Acres are legally identical for land use purposes." *Complaint* ¶ 164.

Appellants' Reply Brief at 9. Lastly, the Paradise Lane Owners observed:

> In assessing whether Paradise Lane and StorageTek's property are similarly situated for the purpose of assessing whether the Equal Protection Clause has been violated, the purpose for imposing the "Rural Preservation" designation is highly relevant. *Allegheny Pittsburgh Coal*, 488 U.S. at 340 n.3 ("their properties were, in *aspects relevant* to valuation and assessment, comparable to surrounding property"; emphasis added); *Equus Associates, Ltd. v. Town of Southampton*, 37 F. Supp.2d 582, 598 (E.D.N.Y. 1999) ("[m]uch as in the lawyer's art of distinguishing cases, the *'relevant aspects'* are those factual elements which determine whether reasoned analogy supports, or demands, a like result"; emphasis added).

Appellants' Reply Brief at 10-11.

The Tenth Circuit rejected these arguments and affirmed the district court on the grounds that Paradise Lane and StorageTek's farm were not similarly situated:

> Even taking the facts alleged in the complaint as true and viewing them in the light most favorable to the Paradise Lane Owners, we find that Paradise Lane Owners have failed to allege facts sufficient to establish that they are

> similarly situated to StorageTek. While the properties owned by Paradise Lane Owners and StorageTek both allegedly total eighty acres and are adjacent, that is where the similarity ends. According to Paradise Lane Owners' complaint, StorageTek is a single commercial entity. Paradise Lane Owners, in contrast, are individual owners of residential property. StorageTek owns the single eighty acre lot under consideration as well as an adjacent lot on which it has built a large, industrial campus. Paradise Lane Owners' land is subdivided into six separate, individually owned lots, one lot totaling twenty acres and the other five lots totaling ten acres (with a ten acre lot unoccupied). StorageTek's eighty acre lot is undeveloped. Paradise Lane Owners' lots have been developed into separate residences occupied by Paradise Lane Owners and their families.
>
> We find that Paradise Lane Owners have failed to allege facts sufficient to establish that they are similarly situated to StorageTek.

6a. The Tenth Circuit did not address that StorageTek's farm and Paradise Lane are both in unincorporated Boulder County, that both are zoned agricultural, and that they are the only parcels so zoned in the area. Nor did the Tenth Circuit address how the "differences" detailed above related to Paradise Lane being more suitable for an

open-space "rural preservation" designation than Paradise Lane.[6]

REASONS FOR GRANTING THE WRIT

I. THIS CASE OFFERS THE COURT A VEHICLE FOR CLARIFYING A VERY IMPORTANT, BUT HERETOFORE UNDEFINED, PRINCIPLE OF EQUAL PROTECTION LAW

Over the past 20 years, this Court has frequently referenced the axiom that equal protection under the law requires equal treatment for persons who are "similarly situated," and gone on to find either similarity or disimiliarity in the case before it. *See, e.g., Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000) (recognizing "class of one" equal protection claim when "intentionally treated differently from others similarly situated"); *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (selective prosecution case; "[t]he study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged"); *Foucha v. Louisiana*, 504 U.S. 71, 85 (1992) (insanity acquittees and persons subject to civil commitment held similarly situated); *Allegheny Pittsburgh Coal Co. v. County Comm'rs of*

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[6] The Paradise Lane Owners throughout their complaint repeatedly alleged that the "rural preservation" designation was for the purpose of preserving open space. *See, e.g.*, Complaint ¶¶ 86, 108, 113, 114, 115 and 116. The Paradise Lane Owners will also testify, if given the opportunity, that at least one Boulder County official admitted that the "rural preservation" designation in the IGA was imposed to secure open space for Boulder County.

Webster County, 488 U.S. 336 (1989) (disparate taxation of similarly situated properties, discussed below); *New York State Club Assn. v. City of New York*, 487 U.S. 1, 18 (1988) (distinguishing different types of organizations subject to city law, discussed below); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."); *Williams v. Vermont*, 472 U.S. 14, 27 (1985) (differential taxation, discussed below); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (women not similarly situated as men for registration purposes because women cannot serve in combat); *Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464, 479 (1981) ("[y]oung women and men are not similarly situated with respect to the problems and risk associated with intercourse and pregnancy").

In none of these cases, however, has the Court offered guidance on how to determine whether two parties are in fact similarly situated. One can glean from the Court's discussions in a few of these cases that the purpose for the distinction at issue is relevant to the determination of whether particular persons are in fact similarly situated. For example, in footnote 3 in *Allegheny Pittsburgh Coal*, the Court quoted certain factual findings below including that " 'it appears that petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and the petitioners' real estate is substantially similar to adjacent and contiguous

tracts and parcels of real estate owned by others.' " 488 U.S. at 340 n.3. This factual observation led the Court to conclude: "We think that petitioners' submissions justify the conclusion on the record presented to us that their properties were, ***in aspects relevant to valuation and assessment***, comparable to surrounding property valued and assessed at markedly lower amounts." *Ibid.* (emphasis added). The Court made similar observations in *New York State Club*, 487 U.S. at 18 ("The City Council's explanation for exempting benevolent orders and religious corporations from the Local Law 63's coverage reflects a view that these associations are different in kind, ***at least in the crucial respect*** of whether business activity is prevalent among them, from the associations on whose behalf appellant has brought suit." Emphasis added.), and in the case of *Williams*, 472 U.S. at 14 ("A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps. . . . In sum, we can see ***no relevant difference*** between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came to Vermont after buying a car elsewhere. To free one group and not the other from the otherwise applicable tax burden violates the Equal Protection Clause." Emphasis added.).

The above highlighted statements certainly should suggest to all courts that the determination of whether persons or properties are similarly situated should be assessed based upon factors that are ***relevant*** to the basis

for the distinction. However, this Court has heretofore not handed down any such directive, an omission that allowed the Tenth Circuit to fundamentally err in the manner in which it dealt with the Paradise Lane Owners' equal protection claim. This case affords an excellent vehicle for the Court to establish an important rule of equal protection law, defining how to determine whether persons or properties are similarly situated.[7]

II. THIS COURT SHOULD CLARIFY THAT THE SIMILARLY SITUATED DETERMINATION INVOLVES A QUESTION OF FACT THAT CANNOT BE DETERMINED IN THE CONTEXT OF A MOTION TO DISMISS

As noted above, the Paradise Lane Owners argued to the Tenth Circuit that the issue of whether Paradise Lane and StorageTek's farm were similarly situated involved a question of fact that could not be determined at the motion to dismiss stage. The Tenth Circuit failed to address this issue and simply responded that based upon the Complaint, the Tenth Circuit could discern sufficient differences between the parcels to support its conclusion that the parcels were in fact ***not*** similarly situated.

There are two problems with what the Tenth Circuit did. First of all, the Tenth Circuit failed to address that StorageTek's farm and Paradise Lane are both in unincorporated Boulder County, that both are zoned agricultural, and that they are the only parcels so zoned in the area –

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[7] As noted in the Statement of the Case, this issue was squarely presented to and rejected by the Tenth Circuit, below.

factors that are highly relevant to the determination of whether properties are similarly situated in the context of land use regulation. Second, the "differences" the court did identify – such as, StorageTek's farm was owned by a "single commercial entity," Paradise Lane was subdivided and StorageTek's farm was undeveloped – were either irrelevant to the determination of which property was more suitable for "rural preservation" designation – that is open space – or would demonstrate to an objective observer that StorageTek's farm was ***more suitable*** for "rural preservation" than Paradise Lane. Thus, what transpired below offers the Court a classic case to address whether the similarly situated determination involves a question of fact, as many lower courts have found, or determined as a matter of law, as the Tenth Circuit did below.

The Paradise Lane Owners alleged in their Complaint that Paradise Lane and StorageTek's property are both 80-acre rectangular parcels, that are immediately adjacent to one another, that are identically zoned, that are both in unincorporated Boulder County, and that, together, constitute a 160-acre parcel of land that is surrounded on three sides by the City of Louisville and on the fourth side by property owned by Louisville. *Complaint* ¶¶ 21, 98, 99. These specific factual allegations easily supported the more general allegation that "Paradise Lane and Storage Technology's North 80 Acres are legally identical for land use purposes." *Complaint* ¶ 164. Certainly, these allegations were sufficient to properly raise this issue at the outset of the case under contemporary notice pleading.

The Tenth Circuit fundamentally misapplied Fed. R. Civ. P. 12(b)(6). The allegations above unquestionably

satisfied their obligation under contemporary notice pleading. As observed by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986):

> Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate ***in the manner provided by the Rule***, prior to trial, that the claims and defenses have no factual basis.

Ibid. (emphasis added). The highlighted language above underscores the procedural error committed by the Tenth Circuit. The Paradise Lane Owners' allegations that Paradise Lane and StorageTek's farm were similarly situated satisfied notice pleading. It was incumbent upon the local government defendants then to come forward with a proper motion under Fed. R. Civ. P. 56, which would then allow the Paradise Lane Owners to make a full factual

presentation demonstrating a genuine issue of material fact. *Id.*, at 322-23.[8]

The Tenth Circuit's procedural error was compounded by its failure to appreciate substantively the relevant factors in determining whether two parcels are similarly situated. As noted by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), "materiality" for purposes of evaluating a motion under Rule 56 (let alone a motion to dismiss), is determined by the context in which the factual dispute arises. *Id.*, at 248. The Tenth Circuit again fundamentally erred by not even

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[8] There are a host of factual issues that can and will be developed at trial if given the opportunity. For example, the factfinder should be allowed to view photos or conduct a site visit. Land use experts should be permitted to compare and contrast the properties, and the Paradise Lane Owners should be permitted to demonstrate the degree to which Paradise Lane and StorageTek's farm, combined, create an identically zoned, identifiable parcel.

One fact requiring additional development is the "fact" that StorageTek's farm is "undeveloped," something the district court and the Tenth Circuit found particularly important. While not alleged in the Complaint, the Paradise Lane Owners will testify that at the time StorageTek purchased the farm, there were three houses on the property, plus other maintenance buildings. StorageTek removed the buildings after it purchased the farm. While the Paradise Lane Owners believe this evidence is irrelevant to the determination of whether the two parcels are similarly situated in the context of evaluating an equal protection violation caused by the "rural preservation" designation, the Paradise Lane Owners should certainly have the right under a proper application of Rule 56 to rebut a factual point, properly raised by the local government defendants in a Rule 56 motion, asserting the "undeveloped" character of the StorageTek farm.

identifying which factors would be relevant in determining whether Paradise Lane and StorageTek's farm were similarly situated and by not allowing the Paradise Lane Owners to make a factual record once the relevant factors had been identified.

III. THE APPROACH TAKEN BY THE TENTH CIRCUIT CONFLICTS WITH THAT OF OTHER FEDERAL COURTS

The Tenth Circuit's approach conflicts with the approach taken by other lower federal courts, both as to the similarly situated determination and in the manner it approached the Paradise Lane Owners' equal protection claim. The lower federal courts that have addressed the similarly situated issue have held that the question is one of fact, requiring a searching factual review, and focusing on the "relevant" or "material" factual aspects. For example, a frequently cited case is *The Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 18-19 (1st Cir. 1989). There the First Circuit opined that persons must be situated similarly "in all ***relevant aspects***." *Id.*, at 19 (emphasis added; citing *Smith v. Monsanto Chemical Co.*, 770 F.2d 719, 723 (8th Cir. 1985). The court further explained:

> The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the "relevant aspects" are those ***factual elements*** which determine whether reasoned analogy supports or demands a like result. Exact correlation is neither likely

> nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples.

Ibid. (emphasis added). A few federal courts, moreover, have squarely held that the similarly situated determination involves a question of fact. *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (referencing the "essentially factual nature of the inquiry. Different factors will be relevant for different types of inquiries"); *Graham v. Long Island Rail Road*, 230 F.3d 34, 39 (2d Cir. 2000) ("Whether two employees are similarly situated ordinarily presents a question of fact for the jury.").

Dartmouth College was followed in the land use context in *Equus Associates, Ltd. v. Town of Southampton*, 37 F. Supp.2d 582 (E.D.N.Y. 1999), a case cited to the Tenth Circuit, in which the trial court conducted a full trial to determine, as a factual matter, whether certain properties were similarly situated for land use purposes. Other cases are clear that whether persons are similarly situated must be determined by evaluating "relevant" or "material" factors. *See, e.g., Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) ("relevant aspects"); *Schumway v. United Parcel Service*, 118 F.3d 60, 64 (2d Cir. 1997) ("all material respects").

The Tenth Circuit's approach also conflicts with that of other federal courts finding equal protection violations in the land use context. *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998) ("In sum, we find that neither the City nor the district court have successfully articulated any rational basis to justify the onerous requirements imposed on the owners of vacant lots subject to [the challenged ordinance] as opposed to the

owners of all other vacant lots, and no such rationale is apparent to this court. While the "rational basis" standard is the least demanding test used by the courts to uphold legislative action, it is not "toothless."); *McKenzie v. City of White Hall*, 112 F.3d 313, 317-18 (8th Cir. 1997) (reversal of dismissal of equal protection claim asserting city's regulatory actions brought against plaintiff had not been similarly brought against similar landowners); *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1361 (6th Cir. 1992) (upholding district court judgment on the merits; "We do not hold that the city may never require a conditional use permit for group home uses. However, where no rational relationship to a legitimate state interest is presented justifying the different treatment accorded to Bannum under the zoning regulations, injunctive relief is the appropriate remedy against the unconstitutional application of the regulations to Bannum's property"); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir.) ("The plaintiffs allege that the defendants treated them differently from other similarly situated landowners along Interstate 95 without any reasonable basis. Accordingly, the plaintiffs state an as applied equal protection claim. These claims . . . should continue."), *cert. denied*, 502 U.S. 810 (1991); *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton*, 997 F. Supp. 340, 351 (E.D.N.Y. 1998) (denying motion to dismiss equal protection claim; "Plaintiff alleges, in essence that it stands in the same position as a would-be builder of an industrial building having a floor area in excess of 10,000 square feet, that the industrial user would not be barred from building such a structure, but that plaintiff would be

barred, and that there is no rational basis for that difference in treatment. Plaintiff clearly states an equal protection claim."); *Sullivan Properties, Inc. v. City of Winter Springs*, 899 F. Supp. 587, 591, 592, 593 (M.D. Fla. 1995). Those courts, although not addressing the similarly situated question directly, nevertheless refrained from imposing the near insurmountable burden erected by the Tenth Circuit below.

IV. THE COURT SHOULD CORRECT AN INJUSTICE AND PERMIT THE PARADISE LANE OWNERS THE OPPORTUNITY TO PROVE AT TRIAL THAT THEY WERE SUBJECTED TO INTENTIONAL DISCRIMINATION

The Paradise Lane Owners acknowledge that the Court does not take cases simply to correct errors below. However, to deny them their day in court – to deny them the ability to show how they were intentionally singled out for "preservation" treatment while a recently acquired neighboring parcel of land escaped similar treatment because of the political power of its owner – is an injustice that can be corrected if the Court decides to hear this case.

In *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000), this Court observed:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been ***intentionally treated differently from others similarly situated*** and that there is no rational basis for the difference in treatment. . . . In so doing, we have explained that " '[t]he purpose

> of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against ***intentional and arbitrary discrimination,*** whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

Id., at 1074-75. The Paradise Lane Owners have alleged such intentional, arbitrary discrimination. The local government defendants misled the Paradise Lane Owners at a time when they were trying to have their land annexed into the City of Louisville. At the same time, they went to StorageTek and asked whether it would mind if it had its land locked up for 30 years. StorageTek objected, and its farm avoided the designation. This conduct may well be found to be actionable *if* the Paradise Lane Owners can show that Paradise Lane is similarly situated to StorageTek's farm under a correct interpretation of the Equal Protection Clause. This Court should correct the Tenth Circuit's error and give the Paradise Lane Owners the chance in court that they deserve.

CONCLUSION

The Court should grant this petition for certiorari.

Respectfully submitted this 17th day of July, 2001.

HALE HACKSTAFF TYMKOVICH & ERKENBRACK, L.L.P.

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEXSEE 2001 U.S. App. LEXIS 7099

ELMER CRIDER; MARLYN CRIDER; LANNY HELMS; MARTHA HELMS; BRUCE GAMBELL; LOIS GAMBELL; BRIAN MESSICK; LYNETTE MESSICK; GEORGE MALLON; NANCY MALLON; LARRY THOMPSON; and KAREN THOMPSON, Plaintiffs-Appellants, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER; RONALD K. STEWART, PAUL DANISH, JANA MENDEZ, in their official capacity as County Commissioners; CITY OF LOUISVILLE; THOMAS DAVIDSON, in his official capacity as Mayor; CITY OF LAFAYETTE; CAROLYN McINTOSH, in her official capacity as Mayor; CITY OF BROOMFIELD; and WILLIAM BERENS, in his official capacity as Mayor, Defendants-Appellees.

No. 00-1094

246 F.3d 1285; 2001 U.S. App. LEXIS 7099; 2001 Colo. J. C.A.R. 1960

April 18, 2001, Filed

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D. Ct. No. 99-Z-1387). D.C. Judge Zita L. Weinshienk.

DISPOSITION:

Affirmed dismissal of Paradise Lane Owners' claims and denied Appellees' motion.

COUNSEL:

Richard A. Westfall (Allan L. Hale and Monica A. Flanigan, with him on the briefs), Hale, Hackstaff, Tymkovich & ErkenBrack, LLP, Denver, Colorado, appearing for Appellants.

David Hughes, Assistant County Attorney, Boulder, Colorado (Thomas S. Rice, Senter, Goldfarb & Rice, L.L.C., Denver, Colorado; J. Andrew Nathan and Nina Hammon Jahn, Nathan, Bremmer, Dumm & Myers, P.C., Denver, Colorado; Richard F. Rodriguez, Holme, Roberts & Owen, L.L.P., Denver, Colorado; and H. Lawrence Hoyt, Boulder County Attorney, Boulder, Colorado, with him on the brief), appearing for Appellees.

JUDGES:

Before TACHA, Chief Judge, LUCERO, Circuit Judge, and BROWN, District Judge.[1]

OPINION BY:

TACHA

OPINION:

TACHA, Chief Judge.

Appellants appeal the district court's dismissal of their equal protection claim. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

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[1] The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

I. Background

The appellants, Paradise Lane Owners, are the individual owners and occupants of six residential properties on Paradise Lane in unincorporated Boulder County. The lots owned by Paradise Lane Owners total seventy acres, with ten acres on Paradise Lane unoccupied. Storage Technology Company ("StorageTek") owns an adjacent eighty acre lot to the south of Paradise Lane. This lot is adjacent to and north of StorageTek's industrial campus.

In 1996, the City of Louisville approached some of Paradise Lane Owners about annexation. Paradise Lane Owners declined annexation at that time.

Subsequent development in the area led Paradise Lane Owners to reconsider. In their view, the surrounding development had changed the rural nature of the area. Paradise Lane Owners hoped to have their land annexed into Louisville so they could get a better price for land and move out. In 1998, they contacted Louisville officials and indicated that they were interested in annexation.

Unbeknownst to Paradise Lane Owners, the City of Louisville was negotiating an intergovernmental agreement ("IGA") with the County of Boulder and the cities of Lafayette and Broomfield. Part of these negotiations concerned placing Paradise Lane in "rural preservation" for thirty years, along with a prohibition against annexation into Louisville during that time. Paradise Lane Owners allege that they were unaware of either the IGA or its impact on their land until after negotiations were completed. They allege, however, that StorageTek was approached during negotiations and was permitted to

object to being placed in rural preservation status. The IGA negotiations were subsequently completed. Paradise Lane was placed in rural preservation for thirty years and prohibited from annexing into Louisville during that time. StorageTek's land was not.

After the IGA negotiations had been completed, Paradise Lane Owners appeared at two Boulder County hearings, one Louisville hearing, and one Lafayette hearing on the IGA and submitted written and verbal objections. Although Paradise Lane Owners succeeded in getting two modifications to the IGA, they were unable to remove the "rural preservation" designation from their property.

Paradise Lane Owners filed a complaint in district court alleging that, because they had been treated differently by the defendants than had StorageTek, their rights to equal protection had been violated. They also claim that the defendants violated their substantive due process rights by arbitrarily and capriciously depriving them of a property interest. The district court dismissed their complaint for failure to state a claim. On appeal, Paradise Lane Owners argue that the district court erred in dismissing its equal protection and substantive due process claims. They also argue that the district court erred in striking newspaper clippings that were attached to their complaint.

II. Discussion

We review de novo the district court's dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Sutton v. Utah State Sch. for the Deaf and Blind*, 173

F.3d 1226, 1236 (10th Cir. 1999). We must take as true and view in the light most favorable to Paradise Lane Owners all factual allegations contained in their complaint. *Id.* "A 12(b)(6) motion should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' "*GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

A. Equal Protection

Paradise Lane Owners argue that, because they were treated differently by the defendants than was StorageTek, the defendants violated their rights to equal protection. The Equal Protection Clause of the Fourteenth Amendment dictates that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." "This Clause 'embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.' " *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998) (quoting *Vacco v. Quill*, 521 U.S. 793, 799, 138 L. Ed. 2d 834, 117 S. Ct. 2293 (1997)). Thus, "[a] violation of equal protection occurs when the government treats someone differently than another who is similarly situated." *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1118 (10th Cir. 1991). To state a valid equal protection claim, therefore, Paradise Lane Owners must "allege facts sufficient to establish that [they are] similarly situated" to StorageTek. *Tonkovich*, 159 F.3d at 532.

Even taking the facts alleged in the complaint as true and viewing them in the light most favorable to Paradise Lane Owners, we find that Paradise Lane Owners have failed to allege facts sufficient to establish that they are similarly situated to StorageTek. While the properties owned by Paradise Lane Owners and StorageTek both allegedly total eighty acres and are adjacent, that is where the similarity ends. According to Paradise Lane Owner's complaint, StorageTek is a single commercial entity. Paradise Lane Owners, in contrast, are individual owners of residential property. StorageTek owns the single eighty acre lot under consideration as well as an adjacent lot on which it has built a large, industrial campus. Paradise Lane Owners' land is subdivided into six separate, individually owned lots, one lot totaling twenty acres and the other five lots totaling ten acres (with a ten acre lot unoccupied). StorageTek's eighty acre lot is undeveloped. Paradise Lane Owners' lots have been developed into separate private residences occupied by Paradise Lane Owners and their families.

We find that Paradise Lane Owners have failed to allege facts sufficient to establish that they are similarly situated to StorageTek. Consequently, we also find that Paradise Lane Owners have failed to state a valid equal protection claim.

B. Substantive Due Process

Paradise Lane Owners also argue that the defendants violated their rights to substantive due process by arbitrarily and capriciously depriving them of their property interests. To state a cognizable substantive due process

claim, Paradise Lane Owners must first allege sufficient facts to show a property or liberty interest warranting due process protection. *Lehman v. City of Louisville*, 967 F.2d 1474, 1476 (10th Cir. 1992). If they satisfy this requirement, Paradise Lane Owners must allege facts sufficient to show that the challenged governmental action was "arbitrary and capricious." *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991).[2] The district court dismissed the substantive due process claim because it found that Paradise Lane Owners failed to allege facts sufficient to show arbitrary or capricious conduct on the part of the defendants. We address this issue first.

Although this court has not previously applied the arbitrary and capricious standard to an IGA establishing limitations on the use of property, this standard has been applied in the context of zoning. Because we find that the limits placed by the IGA on the use of land are substantially similar to those imposed by zoning ordinances, we will apply the arbitrary and capricious standard to the

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[2] As we noted in *Jacobs, Visconsi & Jacobs, Co.*:

> Absent invidious discrimination, the presence of a suspect class, or infringement of a fundamental interest, courts have limited their review of quasi-legislative or quasi-judicial zoning decisions in the face of a substantive due process challenge to determining whether the decision was "arbitrary and capricious."

927 F.2d at 1119. Because Paradise Lane Owners concede that the appropriate standard of review is the arbitrary and capricious standard, we proceed under this standard.

IGA in the same manner in which it is applied to zoning ordinances.

We have noted that the arbitrary and capricious standard in the context of zoning "does not mean simply erroneous." *Norton v. Village of Corrales*, 103 F.3d 928, 932 (10th Cir. 1996). Rather, " 'the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive *only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning.*' " *Id.* (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 (4th Cir. 1995)) (emphasis added). " 'The 'true' purpose of the [policy], (i.e., the actual purpose that may have motivated its proponents, assuming this can be known) is irrelevant for rational basis analysis.' " *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) (quoting *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 246 (1st Cir. 1990)). This long-standing principle has recently been reaffirmed by the Supreme Court: "the State need not articulate its reasoning at the moment a particular decision is made." *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 148 L. Ed. 2d 866, 121 S. Ct. 955, 964 (2001). Rather, under rational basis analysis, we look only to whether a "reasonably conceivable" rational basis exists. *Id.; accord Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999).

In their complaint, Paradise Lane Owners do not allege the absence of a conceivable rational relationship between the IGA and a legitimate governmental objective. Rather, they allege that the defendants enacted the IGA with improper motives. They allege, for example,

that the IGA represents a "horse-trade" of their rights and a conspiracy on the part of the defendants to obtain Paradise Lane at decreased cost. The defendants' actual motivations, however, are irrelevant to a substantive due process claim. *FM Properties Operating Co.*, 93 F.3d at 174. Thus, even assuming that these allegations are true, they do not amount to a cognizable substantive due process claim. Furthermore, Paradise Lane Owners' remaining allegations do not relate to whether there is a rational basis for the IGA, but rather state the effects of the IGA[3] on Paradise Lane Owners and allege error on the part of the defendants.[4] We find, therefore, that Paradise Lane Owners fail to allege the lack of a reasonably conceivable rational basis for the IGA. Consequently, we find that Paradise Lane Owners have failed to state a cognizable substantive due process claim.[5]

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[3] For example, Paradise Lane Owners argue that they must pay double for their water for the next 30 years.

[4] Paradise Lane Owners argue that the defendants erred when they determined that Paradise Lane has no community of interest with Louisville. They also argue that the defendants erred in focusing on the traffic benefits of imposing the rural preservation designation on Paradise Lane but ignoring the traffic impact of the development of the surrounding land. Even if the defendants did err in these respects, conduct is not arbitrary and capricious simply because it is erroneous. *Norton*, 103 F.3d at 932.

[5] Because we find that Paradise Lane Owners have failed to allege sufficient facts to satisfy the arbitrary and capricious prong of a substantive due process claim, we need not address whether they were deprived of a property or liberty interest protected by the Due Process Clause.

III. Conclusion

We find that Paradise Lane Owners failed to state a valid equal protection claim. We also find that they failed to state a cognizable substantive due process claim. Because we hold that dismissal was proper, we need not address Paradise Lane Owner's argument that the district court erred in striking newspaper clippings attached to their complaint. *See Griffin v. Davies*, 929 F.2d 550, 554 (10th Cir. 1991) ("We will not undertake to decide issues that do not affect the outcome of a dispute.").

Accordingly, the district court's dismissal of Paradise Lane Owners' claims is AFFIRMED. Appellees' motion for leave to file sur-reply brief is denied.

[1] **IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO**

Civil Action No. 99-Z-1387

ELMER CRIDER, *et al.*,

Plaintiffs,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, *et al.*,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motion to Dismiss)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:07 a.m., on the 2d day of February, 2000, in Courtroom C-400, United States Courthouse, Denver, Colorado.

APPEARANCES

RICHARD A WESTFALL, Attorney at Law, 1675 Broadway, Suite 2000, Denver, Colorado, 80202, appearing for the plaintiffs.

DAVID HUGHES, Assistant County Attorney, P.O. Box 471, Boulder, Colorado, 80306-0471, appearing for the Boulder County and City of Lafayette defendants.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, [2] P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

RICHARD RODRIGUEZ, Attorney at Law, 1700 Lincoln Street, Suite 4100, Denver, Colorado, appearing for the City of Lafayette Defendants.

THOMAS RICE, Attorney at Law, P.O. Box 22833, Denver, Colorado, 80222, appearing for the City of Louisville defendants.

J. ANDREW NATHAN, Attorney at Law, 3900 East Mexico Avenue, Suite 1000, Denver, Colorado, 80210-3945, appearing for the City of Broomfield defendants.

PROCEEDINGS

(In open court at 9:07 a.m.)

THE COURTROOM DEPUTY: The matter now before the Court, Civil Action No. 99-Z-1387, Elmer Crider, *et al.*, vs. the Board of County Commissioners of the county of Boulder, *et al.*

THE COURT: Good morning. Let's have appearances before we do anything else. Representing plaintiffs?

MR. WESTFALL: Good Morning, your Honor. My name is Richard Westfall. I'm with the law firm of Hale Hackstaff Tymkovich & Erkenbrack. Sitting here at counsel table with me today is Mr. George Mallon, who is one of the plaintiffs.

THE COURT: Okay.

MR. WESTFALL: I also have some of the other plaintiffs here in the courtroom today. I have Larry Thompson, [3] Karen Thompson, Nancy Mallon, Lanny Helms, Martha Helms, Matthew Crider, who is the son of Elmer and Marlyn, and Elmer and Marlyn Crider.

THE COURT: They're welcome to be here.

MR. WESTFALL: Thank you, your Honor.

THE COURT: Representing Board of County Commissioners, Stewart, Danish, Mendez.

MR. HUGHES: Good Morning your honor. David Hughes, Assistant County Attorney, representing the Boulder County defendants and also co-counsel for the City of Lafayette defendants.

THE COURT: Okay. And representing city of Louisville, Davidson.

MR. RICE: Good morning, your Honor. My name is Tom Rice. I represent those two defendants.

THE COURT: Thank you. And City of Lafayette, Carolyn McIntosh.

MR. RODRIGUEZ: Good morning, your Honor. Rich Rodriguez on behalf of the firm of Holme Roberts & Owen.

THE COURT: I had Pat Tisdale, also. Is she –

MR. RODRIGUEZ: That's correct. She's the City Attorney.

THE COURT: Okay. City of Broomfield, William Berens.

MR. NATHAN: Yes, your Honor. Good morning. Andy Nathan on behalf of those defendants.

THE COURT: Thank you.

Let me just say to everybody that I am in trial, and I hope it will be a relatively tight hearing so we can finish so I can get back to my trial. I think that matters will be expedited because I am familiar with the facts. I've looked at the record. I've looked at the arguments. I've read the IGA. I think I understand what the issues are, and I think I understand what some of plaintiffs' problems are, quite frankly, because I think the plaintiff does have some problems here.

Let me just throw out a couple thoughts, questions maybe for the plaintiffs' attorney to consider while waiting to argue. It's going to be the defendants who go first on a motion to dismiss.

Claim 1 is a facial challenge under the Constitution, equal protection; and we have in the Tenth Circuit a case called *U.S. vs. Castillo*. And I'm sure that counsel are all familiar with that. It's Tenth Circuit, 1998, which upheld dismissal of equal protection claims when the court was able to find or when it appeared there was a legitimate state interest rationally related to the legislation – or in this case to the agreement in question. I would like to hear in the argument how plaintiff is able to distinguish that case, which appears to be on point and contrary to the plaintiff's position.

It also appears to me that in looking at the IGA, [5] there are factual sections which do evidence legitimate state interests, and that is an important consideration.

Let me just go to some questions on the second claim. I am not sure what entitlement plaintiffs are claiming. Are they claiming entitlement to rezoning, entitlement to annexation? Basically – let me just maybe end it with this: Basically, isn't this actually a case rather than being unconstitutional on its face being unconstitutional as applied in which case it's unripe and should be brought later? Might this not be a case of procedural due process, which also should be brought later?

I think these are all the questions that plaintiff can think about; and while you are, let me hear the argument by – who is going to be the person arguing for –

MR. HUGHES: I am, your Honor.

THE COURT: Let me hear the argument on the motion, and let's try to keep it to ten minutes, reserve five for rebuttal.

DEFENDANTS' ARGUMENT

MR. HUGHES: Very good, your Honor.

Your Honor, I think you touched on some very good points in your opening questions and that were some of the things that I was hoping to address today.

Although the plaintiffs frame their case as a facial challenge to the intergovernmental agreement, they – their [6] complaint and their response contains numerous allegations which would be relevant only if they're making an as applied challenge – an as applied equal protection challenge, an as applied substantive due process challenge, a takings claim, or a procedural due process claim.

For example, in their compliant, the plaintiffs allege that the IGA facially designates their properties as open space, when, in fact, the IGA on its face does not designate their property as open space but rather places it in a rural preservation district. In fact, their complaint further specifies that their properties were and are at least for the most part occupied by residences; so that again works against the assumption made by plaintiffs that the IGA designates their property as open space.

The plaintiffs also argue that the IGA prevents annexation into the City of Louisville; but if you look again at the IGA on its face, it does not prevent annexation into the City of Louisville but rather prevents Louisville from permitting annexation without first obtaining approval of a plan amendment. And that again is the IGA on its face.

The complaint and the reply also contains other accusations and allegations that fall well outside of the IGA on its face. For example, they complain that the defendants failed to follow proper land use procedures; that they talk about development in the area near the IGA. They talk about [7] their prior requests for annexation, and they talk about previous characterizations of their properties in a prior intergovernmental agreement. These are all things that fall outside of a facial challenge to the Intergovernmental Agreement.

The reason why plaintiffs want to call this a facial challenge and yet make these allegations that are outside of the facial challenge I think points to the fundamental problem with their complaint. If they haven't made an as applied challenge or a takings claim or a due process

challenge, then the Court would easily dispose of them based on exhaustion/ripeness problems which you mentioned earlier. But if it's purely a facial claim, then the IGA if examined on its face is a – is constitutional.

The reason why a purely facial challenge fails is, No. 1, because on its face the StorageTek property and the Paradise Lane properties are not legally similar. And looking at the IGA on its face, which includes a map of the area – and I know you're pretty far away here, but I think –

THE COURT: I have the map right here.

MR. HUGHES: But just looking at the IGA on its face, you can see that the plaintiffs have subdivided parcels which are separately owned, whereas –

THE COURT: I think there are seven, are there not?

MR. HUGHES: Yes. There are seven parcels that are [8] owned by the plaintiffs. There is actually – I mean – I'm sorry. There are seven parcels total in the area. Only six of the ones are owned by plaintiffs. Five of them are 10-acre parcel, one of them is a 20-acre parcel. And looking at the – again at the face of the map, you can see that the Storage Technology property, which is the only property specifically pointed to by plaintiffs, is a singly owned, undeveloped parcel of land.

THE COURT: Maybe I missed something. You said six of the seven are owned by the plaintiffs? I thought it was all seven. Which one is not?

MR. HUGHES: I believe it's the Couillard property.

Is that correct?

MR. WESTFALL: That is correct, your Honor.

THE COURT: Thank you.

MR. HUGHES: So just looking at the map on its face, you can tell that these are not similarly situated properties.

Moreover, the compliant further alleges that – that the plaintiffs' properties were and continue to be used as residential and agricultural properties, whereas the StorageTek property is undeveloped.

Even if the Court were to decide that at least for purposes of a motion to dismiss these are similarly situated properties, there are numerous rational bases for distinguishing between these two properties. Again, looking at [9] the map, it's obvious why a government would want to draw a line between these subdivisions clearly subdivided on the map and an open piece of property that's singly owned. That just makes sense looking at the IGA on its face.

But there is also other considerations that clearly make this a rational relationship between the – distinguishing between the two properties. There is the need to prevent additional traffic congestion in the area. The governments entering into this agreement would be unwise to assume that these properties that currently contain residences are going to be scraped off and made into some sort of commercial development. They have an interest in keeping it as it is so that there is not even more traffic attracted to some other commercial use or even

some higher density residential use. Either of those would attract additional traffic to the area.

And then there is the obvious economic interest. Storage Technology is a major employer in the Louisville area. It owns property. Its headquarters are contiguous to the Storage Technology property identified in the complaint, and Louisville and the other local government entities have an interest in at least giving the StorageTek property or the StorageTek company an opportunity to expand in the future if they so desire.

So there are numerous rational bases for drawing the line between a residence, developed, separately owned parcels [10] of property, and a singly owned, undeveloped parcel of land owned by a major employer in the area.

Turning to the issue of substantive due process, your Honor, you brought up the point that there is no property interest articulated. And I agree with that. If the plaintiffs want to point to their interest in annexation, we would respond by saying that annexation by state law is a completely discretionary process. And when something is so discretionary, that leaves any property interests – that dissolves any property interest in that type of process.

Plaintiffs also point to the fact, they say that, Well, they were deprived from applying for annexation, but the IGA on its face doesn't say that. If the plaintiffs wanted to, they could go and apply for annexation into the City of Louisville today. All the IGA says is that not only must Louisville consider the – the application and if Louisville determines that they do want to annex, then they have to get an amendment to the plan approved by the other

parties to the Intergovernmental Agreement. So it doesn't keep plaintiffs out of the process, it merely makes a different determination on who exactly decides how this is going to happen.

Governmental cooperation – and this isn't something that, you know, is brand-new. The IGA statute is part of state law. It's something that a property owner must consider along with the other property interests under state law; that [11] Governments need to cooperate and that sometimes their property may be subject to these type of agreements. So they don't have an interest in – they don't have an established property interest in never being subject to an intergovernmental agreement.

And as I stated previously, there are numerous rational bases – even if the Court does find that there is a rational basis, there are numerous rational bases for making this decision in the IGA. Because the IGA, if truly analyzed on its face, is constitutional under both an equal protection analysis and a substantive due process analysis, the claim should be dismissed.

THE COURT: If the Court dismisses the claim at this point, might there be a possibility of a later challenge based on procedural due process or based on an as applied claim?

MR. HUGHES: Yes. As far as procedural due process goes, if the plaintiffs exhaust their state remedies which they have under – under Colorado law and they're unable to get satisfaction, they may be able to allege a due process challenge.

THE COURT: Do you want – okay. Do you want to quickly say anything about the third and fourth claims?

MR. HUGHES: Well, I believe that the third claim is substantially identical to the first claim. And I think plaintiffs had agreed with that, so I think the arguments I [12] made related to the first claim would apply equally to the third claim.

In terms of the fourth claim, we have argued – and we haven't even yet responded to the state law challenges. And since it involves issues that are uniquely focused in Colorado law and areas that haven't been addressed by the Colorado courts, we would find it inappropriate for the Court to exercise jurisdiction on these state law claims.

THE COURT: So what you're saying is if the Court decides in defendants' favor on the federal claims, constitutional claims, then the Court should decline to exercise jurisdiction on the supplemental state claims.

MR. HUGHES: That's correct your Honor.

THE COURT: And that means that the plaintiff can bring an action in state court.

MR. HUGHES: Absolutely, your Honor.

THE COURT: Thank you.

MR. HUGHES: Thank you.

Let me hear from the plaintiff, please – or I'm sorry. Did any of the other attorneys for defendants want to put in their two cents' worth? I assumed that Mr. Hughes is

speaking for all of you, but I don't want to cut you off, if somebody wants to say a word.

MR. RICE: I think Mr. Hughes addressed things just fine, your Honor.

[13] THE COURT. All right. Okay.

Mr. Westfall, let's hear what you have to say.

PLAINTIFFS' ARGUMENT

MR. WESTFALL: Well, your Honor, I hope I have answers to all your questions that you posed for me at the beginning of the hearing.

The real difference that we have here that sets this case apart – and really, I'm addressing the substantive due process, the entitlement issue – is the idea that looking through all the case law – and the case law in this circuit on substantive due process and the case law in other jurisdictions as well, we have not encountered – I haven't seen a case that deals with a 30-year prohibition like we have in this particular instance.

I think that – and I'll elaborate in a moment about what goes on during that 30 years, but to impose such a debilitation for such an incredibly long period of time, which will indeed be likely longer than the lives of many of the plaintiffs that are sitting here today, makes this case fundamentally different from the typical entitlement case.

THE COURT: Well, the agreement is 30 years; but there certainly is an amendment provision, is there not?

MR. WESTFALL: Okay. I'll address, that your Honor. Getting at the so-called state remedies that would be available to us that we would supposedly be able to exhaust, as [14] you will see, your Honor, we do make a challenge as applied to the – a specific statutory provision, 29-20-105. We have a specific state statute which is in my mind anomalous with the other local government statutes. It creates its own sort of separate set of powers that allow for intergovernmental agreements. It allows the bodies to do what they've in fact done in this instance, is to make it binding for 30 years. And if one party dissents – one party – the process ends.

Boulder County right now has a very strong desire to maintain the open space character of my clients' property, and I'm going to demonstrate that in a moment as to how that actually is reflected in the documents themselves. But they are – assuming Boulder County, irrespective of what happens with the other three governments, who can think, Fine, we have no trouble at all allowing an amendment, allowing annexation, let's say, into the City of Louisville, which was going on at the time that the intergovernmental agreement was taking place, the negotiations over that – if Boulder County just issues a veto, says no, that is statutorily enforceable under 29-20-105. That's not much process your Honor. And they can exercise that will for 30 years without any access to the rezoning laws, without any access to the annexation laws, the whole host of other neutral laws that were – that were referred to in the *Romer vs. Evans* case, where the U.S. Supreme Court found that any sort of special debilitation or denial of generally [15] applicable laws can indeed give rise to a constitutional injury.

Turning to your questions in the order in which you framed them for me, the issue of whether this is a facial challenge and whether deference needs to be given to the findings, if you will, that were made by the local governments that are set forth in the Intergovernmental Agreement, I have the following points:

First of all, *United States vs. Castillo* was providing – was affording deference to an act of Congress concerning a criminal – a rule of criminal law. I think it is a fair distinguishable situation where you're looking at a – what we've alleged – and we have to take the allegations of the complaint as true for purposes of this proceeding. We have alleged that the decision that was made was made with improper motives in a back-room deal, in a non public setting. And the kind of – the deference that they are claiming that they are entitled to under the *Castillo* case, which again it was a case involving a deference to Congress through the full deliberative process, we'd have a very, very different situation in here, where we have –

THE COURT: Maybe I missed that. Where have you alleged back room deals and improper motives?

Do you have the first jacket, Jeff?

I have it. What part of your complaint alleges –

[16] MR. WESTFALL: If you could just give me a moment.

THE COURT: Okay. I don't want to interrupt your argument.

MR. WESTFALL: No, I'd like to address that.

THE COURT: We'll go back.

MR. WESTFALL: This will only take a moment. I just need to refer to my brief to find this.

THE COURT: Well, let me just remind you of what I thought I read, and that is that you didn't have enough information to really so allege and that you were concerned about Rule 11.

MR. WESTFALL: No, that was with respect to animus, actual dislike of my clients. We believe there is hard evidence that there is – and we allege that in the complaint – where it did take place in a back room setting. It's our understanding that based upon the evidence that I have to date – and we'll be taking, assuming I get past this hearing today, the deposition of Boulder County's 30(b)(6) representative tomorrow. But it's my understanding based upon my Rule 11 review that what happened was there was an initial map that was created, where there was going to be a new version of the Intergovernmental Agreement that – taking place from the one that had been expired in 1991. That's all set forth in the complaint; that at the time that the negotiations started up, which was in, I believe, late summer of 1998, my clients [17] were trying to seek annexation into Louisville. They were purposely misled, we allege in our complaint, as to the existence and negotiations overt Intergovernmental Agreement.

At the same time, private meetings were held. And indeed, at one point the parties asserted deliberative process privilege when I tried to get access to the notes of those early meetings where key representatives from the four governmental entities got together and they cut the

deal. They made the determination as to which entities would be given rural preservation designations, and they made a determination as to which ones would not. They made a determination of who could annex who and who could not. But that was not done in a formal deliberative process. That was done in a negotiated setting, without public scrutiny, in a small, back-room setting. That's our allegations, and we believe the evidence shows that.

Given that that is the process under which these decisions took place that they're now asserting should be – should be afforded deference, that is an extremely difficult – different situation than the situation you have in *Castillo,* the Tenth Circuit case, where it's affording deference to an act of Congress during full deliberation. It's a very different situation. That's why there should be no deference afforded in this particular instance.

And I would like to point out to the Court, if the [18] Court would examine the equal protection cases that we have cited in our brief, that in none of those situations is there any such difference, at least in the cases that I've looked at. And in fact, there is exactly the opposite.

If I may, I'd like to call the Court's attention to some of those cases; and the pages –

THE COURT: Let me also ask you to comment on the Tenth Circuit case following *Castillo* – or actually before, which is the *U.S. Railroad Retirement Board vs. Fritz* on the same proposition. Do you want to say anything about the *Fritz* case?

MR. WESTFALL: I don't have the *Fritz* case in front of me. I do have the *Castillo* case. Let me look at the *Castillo* case, and maybe it's referenced.

THE COURT: I don't want to cut your argument in pieces. I'll keep quiet. If I have questions at the end, I'll save them up.

MR. WESTFALL: No, it's important that I answer your questions, your Honor.

I don't know if there is anything in the – let's see here. I apologize, your Honor. I have not read that case, and I do not – and the *Castillo* does not afford the factual basis, but it says *United States Railroad Retirement Board vs. Fritz*. I'm not sure what kind of context I can draw from the names of the parties, so I cannot respond to that, your Honor.

[19] THE COURT: Go ahead.

MR. WESTFALL: First I'd like to call the Court's attention to the *Sullivan Properties* case *vs. City of Winter Springs*, 899 Fed. Supp. 587, particularly calling the Court's attention to page – page 592. It begins – that begins the discussion of the equal protection claim. There is a specific discussion in there where it says, "Winter Springs asserts that in considering and ultimately rejecting Sullivan's application, it was," quote, " 'clearly,' " close quote, "concerned about a number of legitimate state interests, including environmental concerns and the safety and welfare of its citizens."

So in that case, you had the defendant governments, local governments, making the same kind of generalized arguments that "We're doing good here, we're preserving

open space, we're reducing traffic," the other things set forth in the Intergovernmental Agreement itself, some of which are, some of which are not. But the same type of police power justification were asserted in that particular case. And the U.S. District for the Middle District of Florida in 1995 found – said there was still a viable equal protection case that should – That was on a motion to dismiss level. So the court denied the motion to dismiss and said there was a well-stated claim and allowed the case to continue, despite those kind of assertions that you should afford deference because we have rational bases that we can at least envision or [20] think up at this time and therefore we should go ahead and dismiss the case.

In the case of *Berger vs. City of Mayfield Heights*, 154 F.3d 621 – that is a Sixth Circuit decision, 1998. There you had a situation where the district court had supplied the rationale for the local government and said, I can envision a number of rational basis that would justify the discriminatory treatment that existed in that particular situation. That was a zoning case. There, some lots – some types of lots were going to be subjected to some kinds of regulation and other types lots were not going to be subject to that kind of regulation. The district court granted a motion to dismiss or summary judgment – I can't remember which here; but in that – and the court did exactly what the defendants are asking this court to do here today. The court said – the district court said, I can envision a number of rational bases.

Well, the court of appeals, reversing the district court, did not – you know, said it appears to be irrational – in that case it appears to be irrational. It's an example at

an appellate level where these kinds of proffered rationales that they're asking this court to give deference to were rejected by, in that case the court of appeals.

Similar circumstance occurred in the case of *Bannum, Inc. vs. City of Louisville, Kentucky,* 958 F.2d 1354. That was an exclusionary zoning case. There, the district court –

[21] THE COURT: The problem with district – these are circuit cases?

MR. WESTFALL: That's a circuit case but affirmed the district court's rejection of the proffered rationale by the local governments. The central – the two central points I'd like to make here is that, No. 1, the same kind of deference that they're asking be afforded them was the deference that was afforded Congress or certainly I would suspect it would have to take a full deliberatory [sic] body. Where you have a situation where you have clear allegations that are well-pled; that completely undermine the legitimacy of the process by which those decisions were made, it is, I think, very inappropriate to allow deference to be granted, particularly of a level that we're talking about that is discussed in the *Castillo* case.

THE COURT: I think I misspoke. I thought *Fritz* was Tenth Circuit. I think that is U.S. Supreme Court. That's the case that the *Castillo* case cited.

MR. WESTFALL: Yes.

THE COURT: Okay. Go ahead.

MR. WESTFALL: Turning further to the facial issue here, does the Court have before it the – both the reply brief that was filed by Boulder County and the

Intergovernmental Agreement that's attached to the motion to dismiss by Boulder County?

[22] THE COURT: I have the whole file.

MR. WESTFALL: I would like to call the Court's attention first to the Boulder County reply and specifically on page 5 of that reply brief.

THE COURT: Go ahead.

MR. WESTFALL: Although I don't completely agree with the analysis of the commentator, Mr. Mandelker, it seemed to be very, very important to Boulder County in asserting its facial vs. as applied position that is, as is reflected there, that if the text of the Intergovernmental Agreement creates some differential treatment, then that can give rise to a facial challenge; but if you're just talking about a map or an application of the provisions that are set forth in the Intergovernmental Agreement, then that must necessarily be an as applied challenge.

Again, I don't agree with all the rationale set forth in the quotation we have here before us; but I do want to stress a point that I think is very, very important, one that I think the defendants have not been completely open with as far as in discussing this issue. The type of facial classification we're talking about here does take place. If the court would turn its attention to the Intergovernmental Agreement itself, specifically page 14, which starts out Exhibit A –

THE COURT: Do you want me to still hold on to the reply brief, or –

[23] MR. WESTFALL: I've made my point with respect to that. I just want to make note that clearly what they were saying if there is something – there is differential treatment in the text, then we have a facial challenge; and that, according to the quotation, is the appropriate vehicle to challenge the differential treatment in the text.

THE COURT: I'm with you. Go ahead.

MR. WESTFALL: Look just under Exhibit A at the very top of the page. It says, "Text Portion." Now, please turn your attention to the next page, page 15. It says, "Specific Parcels Provision." Now, the specific parcels that are at issue in this case are expressly described on page 18. If you look at page 18, the heading that's or the entry for 4.16 says parcels numbered 157520000002 and then 000003, etc., etc. 4.16 refers to Paradise Lane.

Now, let's look at what they say about Paradise Lane in the text portion of the Intergovernmental Agreement. "Future use should be limited to agriculture and low density residential development."

THE COURT: You're still on page 18?

MR. WESTFALL: Yes, I am. Reading directly from the paragraph 4.16 towards the top of that page. "Future use shall be limited to agriculture and low density residential development. Boulder County agrees to consider approval of residential use with a density of no more than one unit per [24] 4.5 acres on these parcels –" now, this is an important part of this case in my mind "– provided that a perpetual conservation easement limiting development to no more than one unit per 4.5 acres is secured as a part of the approval of the new density."

The reason for that – there is a number of things that flow from that. No. 1 is that it – the IGA itself expressly contemplates that if we double the density of Paradise Lane, it is still an area that would be properly subject to a conservation easement. The statute that was cited for – by the defendants of the Colorado statute that deals with conservation easements make it clear that it has to be – that has to be something that is available for open space or various historic preservation purposes.

So this – the IGA on its face says if we double the density of Paradise Lane, it still properly can be treated as open.

The second significance of this is the exaction nature. As you may know through *Dollan* and some of the other Supreme Court cases, if I'm a government and I say, *Quid pro quo*, if you don't give me this five acres here that I want for a buffer, or something along those lines, I'm not giving you your building permit, I'm not giving you a land use approval, that kind of *quid pro quo* has been expressly held to be unconstitutional by the United States Supreme Court.

[25] That's exactly what we have here. They said you can double your density; but if you double your density, you're going to have to give us a permanent conservation easement, which we have specifically alleged in our complaint is one of the arbitrary and capricious problems that we have – that we allege occurs in the substantive due process context.

The key case, I think, that really ties in together is the *McKenzie* case *vs. the City of Whitehall*, Eighth Circuit, 1997, 112 F.3d 313.

THE COURT: Let's see if you can try to wind up. You've gone over your 15 minutes.

MR. WESTFALL: Okay. I'm sorry, your Honor.

The *McKenzie* case, if we look to – it will be page 317. It says, "Appropriation after public easement across a landowner's property is the taking of a property interest rather than a mere restriction of land's use." this was a situation where it was precisely a *quid pro quo* situation. The local government was demanding a buffer: If you don't give us the buffer, you don't get a land use approval. Simple. Exactly what's contemplated under 4.16.

Actually, before I get too far ahead of myself, let me go back to the Intergovernmental Agreement, because I wanted to make this point before. And it's very important to finish up on the imbalance protection point before I go back to the other issue.

[26] If you look under 4.16, there is a 4.17 entry. do you see that, your Honor?

THE COURT: Okay. We're still on page 18. 4.16.

MR. WESTFALL: 4.17.

THE COURT: 4.17.

MR. WESTFALL: 4.17 is the description of the Storage Technology north 80 acres, and it specifically says at the very bottom there the parties agree that only Louisville can annex this property. There is an express allowance of annexation. So you have here in the text

portion of the Intergovernmental Agreement 4.16 disabilities being placed on Paradise Lane; 4.17, indeed authorization to go ahead and annex into Louisville with no rural preservation designation. That is a facial distinction that's set forth expressly in the text portion of the Intergovernmental Agreement itself.

We rightfully bring a facial equal protection challenge in this particular instance. The only thing that we're doing with respect to the facts is we're bringing in context. You cannot do constitutional litigation without understanding the context in which these facial distinctions take place.

With respect to, for example, the question of whether or not the properties are similarly situated, the *Equus* case that we cite in our brief makes it an [sic] abundantly clear that is a fact-based determination. That's the only way you can [27] determine if Parcel A and Parcel B are in fact similarly situated. You just can't look at the maps and take their word for it. It doesn't work that way in constitutional litigation under equal protection in the land use context.

THE COURT: Would you finish up, please.

MR. WESTFALL: Yes, your Honor.

Your Honor, we believe that we have adequately pled an equal protection claim. As I've pointed out for the Court, we do have a proper facial challenge. The Intergovernmental Agreement on its face provides that the very distinction that we are challenging.

From a substantive due process standpoint, we do have both a property and a liberty interest that are entitled to constitutional protection. The property interest is the idea that you have denied a host of benefits to the defendants for – for the severity of it, the 30-year duration, which is what really causes the problem here. It's not – if this were just an intergovernmental agreement that could be amended and there was no 30-year determination on it that gave Boulder County veto power for 30 years, maybe it would be a different case; but it's not. They've decided to put a 30-year limit on it, and that's a very different case.

THE COURT: There was a clause that says it may be amended during that 30-year period.

MR. WESTFALL: Yes, your Honor; but to get the [28] amendment you require unanimous vote of all four jurisdictions. And one jurisdiction can hold the other three jurisdictions hostage, and that totally disrupts the balance. Getting at, for example, in the annexation context, the Colorado annexation laws give deference to the city, not the county. And the county, if it wants to challenge it, it's in no different situation than any other private citizen using the Rule 106 procedure, which I'm sure the Court is familiar with. Now Boulder County has veto power. That's the essence of the fourth claim. That's why we bring our fourth claim.

THE COURT: Thank you.

MR. WESTFALL: I have nothing further, your Honor.

THE COURT: Let me briefly hear rebuttal argument.

DEFENDANTS' REBUTTAL ARGUMENT

MR. HUGHES: Your Honor, addressing plaintiff's point about the Boulder County veto, it sounds like what plaintiffs are saying is that sometime in the future if Louisville did, in fact, decide they wanted to annex the property that Boulder, for reasons of wanting to actually develop the plaintiff's property into open space, would for no good governmental purpose deny amendment to the IGA.

Well, if that did, in fact, happen, then that might be an as applied challenge; but we're not there yet. We're just looking at the face of the IGA.

Responding to Mr. Westfall's discussion related to [29] *U.S. vs. Castillo*, he talked about that the fact that *U.S. vs. Castillo* didn't have allegations related to the process of how the – in that case it was the Federal Rules of Civil Procedure were passed related to sexual predators. But in *U.S. vs. Castillo*, it was a facial challenge; so the court properly did not look into the process that the rules of civil – of criminal procedure were – I'm sorry – the rules of evidence in that case were developed because it was a facial challenge, it wasn't a procedural due process challenge saying that, well, Congress developed this law based on back room deals and therefore this law shouldn't be upheld. And probably in *U.S. vs. Castillo*, there were some meetings between members of the Congress and lobbyists and the offices of the senators which the public wasn't privy to.

The other point I'd like to make is that there is no allegation that any of the parties failed to hold a public hearing. As a matter of fact, the IGA was amended as a result of a public hearing in this case. The Paradise Lane owners expressed their concerns about the IGA, and Boulder County listened. And that's why there are specific provisions related to the Paradise Lane property and to the StorageTek property.

They were singled out, yes, singled out for a benefit that other properties in the rural preservation district didn't have, the benefit of the ability to apply for higher density and the benefit of having a neighboring property if annexed. [30] And the IGA just says if and when annexed by the City of Louisville; it doesn't guarantee it's going to be but if and when annexed by the City of Louisville, then there is going to be a buffer zone.

Now let's say these provisions didn't exist at all. Are the plaintiffs saying that because their property – their properties were given a benefit that other properties in the rural preservation district didn't have that they have a facial challenge? Should the Boulder County Commissioners instead of listening to the Paradise Lane owners and trying to make an accommodation have left them out of this possible benefit because they were concerned that the IGA might be held facially unconstitutional because they made a specific concession to these plaintiffs? That seems to me to be the opposite of the way it should work.

Mr. Westfall pointed to the *City of Winter Springs* case and the *Bannum* cases. Both of those cases were as applied challenges. And if you look at plaintiffs' or at

plaintiffs' response brief, it is replete with cases in which there are as applied challenges.

And I think that's an important point to make, is that even though the plaintiffs keep saying they're making a facial challenge, they point to all these as applied challenges cases. And I think that that again reflects the fundamental problem with their case.

[31] And he did – and Mr. Westfall did end with the cite of the *McKenzie* case, which is once again a ripe as applied/due process claim.

Thank you.

THE COURT: Thank you.

RULING

THE COURT: I really don't have much question how this case must be decided. When one is talking about the equal protection facial challenge, as the plaintiff is, the test – to be a facial challenge, the plaintiff must demonstrate that the IGA on its face treats plaintiffs differently than similarly situated parties and given that plaintiffs are not part of a protected class that there is no rational basis for such treatment. That's the test.

Now, many cases have been cited which are not Tenth Circuit cases; but we do have Tenth Circuit law here. And even though certainly *U.S. vs. Castillo* – and let me put that cite on the record: 140 F.3d 874 – did deal with a rule of evidence and with a congressional enactment, there is a very clear principle stated in that case for the rational basis test. We cannot go to Florida or the

Eastern District of New York or other circuits because we have law right here in the Tenth Circuit.

On page 883 of *U.S. vs. Castillo*, the Tenth Circuit says the following: "Under the rational basis test, if there [32] is a plausible reason for –" in that case Congress, Congress' action "– our inquiry is at an end," citing the U.S. case that I mentioned, *Railroad Retirement vs. Fritz*. "We need not find that the legislature," in this case, the parties to the IGA, "ever articulated this reason, nor that it actually underlay the legislative decision, nor even that it was wise. There are plausible reasons for the enactment of Rule 414. Congress' objective of enhancing effective prosecution of sexual assaults is a legitimate reason."

And in this case, there are certainly many plausible reasons set forth in the IGA for this type of agreement, we have state interests and regional interests to preclude increased development. I'm looking on page 1 of the IGA; to preclude urban sprawl. There are many other discussions of the need for keeping rural areas to prevent congestion at interchanges. There may in the future be a highway in this area. So throughout the IJA [sic], the discussion, there are many reasons stated, a number of justifications for the actions. And these do indeed provide a rational basis for IGA's distinctions.

And the Court would have to say that I think there is sufficient distinction that has been argued between the plaintiffs' property and StorageTek. StorageTek is an employer of many people in the area. They may have need for expansion. Their land is undeveloped, so on, and so forth.

[33] So the first claim, the facial challenge under the equal protection clause, is not a good claim under *Castillo*, under the ruling of *Castillo*, even though the facts of *Castillo* may be somewhat different, because as a matter of law there is a rational basis and as a matter of law *U.S. vs. Castillo* does apply. I can't see how it can be distinguished from this matter.

On the second claim, the substantive due process claim that the IGA is arbitrary and capricious: The test on that claim is whether the plaintiff is entitled to a – has shown that they have an entitlement to a property interest and secondly that the state's actions in depriving plaintiff of the entitlement is arbitrary and capricious.

Within the wording of the IJA [sic] are indeed provisions for amendment, approval by all four signatories. And what plaintiffs are saying is this is not sufficient and there really isn't any meaningful way to amend the IGA. But we have here an arbitrary and capricious standard, and we again have the law and Tenth Circuit law that speaks to this issue.

Norton vs. Village of Corrales, which is a 1996 Tenth Circuit case, 103 F.3d 928, says the following: "We have said –" and I'm reading from page 931. "We have said that in a city zoning case, authority in this circuit is unclear on what interest is required to trigger substantive due process guarantees. In the entitlement analysis, nearly all courts [34] focus on whether there is discretion in the defendants to deny a zoning or other application filed by the plaintiffs. Since entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise, the question of whether an

applicant has a property interest will normally be a matter of law for the court."

The plaintiff in this case has not satisfied the test on the second claim, substantive due process claim, that the IGA on its face – we're not talking about as applied but on its face is arbitrary and capricious. There was some discussion of back-room deals, but there is no allegation that substance – substantial allegation that there was a personal animus to support the arbitrary and capricious test, if I'm understanding it, in this second claim. So the second claim does not withstand a challenge by the defendants.

The third claim is derivative of the first and second. It's the state statute. Is the state statute unconstitutional? And if the first and second claims are to be dismissed at this time, then the motion to dismiss the third claim should be dismissed.

The three federal claims if dismissed then leave the Court with the question of whether the Court should take supplemental jurisdiction over the fourth claim. The fourth claim is a state claim. It's a peculiarly state issue. It's one that really the state should decide; and the Court will [35] decline to rule on the fourth claim. And if the plaintiff wishes to have this decided, this claim should be brought in state court. So that fourth claim also should be dismissed.

So the motion to dismiss on the first claim, second claim, and third claim – those three motions to dismiss all are granted and the fourth claim motion to dismiss is granted with leave to – it's dismissed without prejudice, with leave to raise it in the state court.

The defendant's motion to strike is also granted. We normally do not permit clippings and newspaper articles to be attached to legal complaints, and I see no reason to do it in this case. So the motion to strike is granted.

Broomfield's motion to dismiss will be denied at this point because Broomfield is a part of the IGA. And if the case is brought against the parties to the IGA, then Broomfield is one of those parties.

I can understand plaintiffs' concern, but there have not been sufficiently legal claims brought before the Federal Court for this court to take action on some of these concerns. And again, I believe that there is rational basis in the IGA for what was done, and I believe there are indications that there are amendment procedures. And as we know from Tenth Circuit law, it doesn't matter how – how much of a probability there is that it will or will not be amended. The procedures are there.

[36] So at this time, the Court will indeed grant the motions to dismiss.

Okay. Let me just make clear – thank you, Geoff.

My law clerk pointed out that even though Broomfield's motion to dismiss is going to be denied, they are covered by the overall motions to dismiss of all the parties to the IGA, which motions to dismiss are granted.

Perhaps what I should do is make clear on the record – and Jeanette, let's do this on the minutes – that Broomfield's motion to dismiss, being the first thing decided, is denied. Thereafter, the Court is going to grant motions to dismiss as to the first, second, and third claims, which are the motions of all defendants, including Broomfield, so

that the first, second and third claims are dismissed and the – for the reasons that I've stated – and the fourth claim, which is really a state law claim, although it's dismissed at this time, may certainly be raised, if the plaintiff chooses to do so, in state court.

That terminates the case, at least in Federal Court at this time. And there may indeed – and I'm not going to issue any advisory opinions – there may indeed be some later claims that the plaintiffs will choose to bring. As applied claims, as has been pointed out, are not ripe at this time. They can be brought later indeed if they are appropriate. Procedural due process claims are not ripe at this time but may be [37] brought – may or may not be brought at some later time.

So this case is dismissed, and I leave it to the parties to discuss this matter.

Let me just point out one more thing. Judge Watanabe is a very good magistrate judge. And I'm sure he's met with all of you. And if you folks think that there is some room for discussion before an appeal is brought and you think you can work out some agreements, I urge you to talk together. And if you think that Magistrate Judge Watanabe can be helpful, even though this case is dismissed, I will ask him to make himself available; so let me know if that is a possibility.

Thank you. This has been an extremely interesting argument and briefing, and I appreciate the work that went into it.

And we will be Mr. [sic] recess and start up our jury trial shortly.

(Recess at 10:10 a.m.)

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INDEX

Item	Page
Defendants' Argument	5
Plaintiffs' Argument	13
Defendants' Rebuttal Argument	28
Ruling	31

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 4th day of February, 2000.

/s/ Paul A. Zuckerman
Paul A. Zuckerman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SENIOR JUDGE ZITA L. WEINSHIENK

Civil Action No. 99-Z-1387

ELMER CRIDER, MARYLN CRIDER, LANNY HELMS, MARTHA HELMS, BRUCE GAMBELL, BRIAN MESSICK, LYNETTE MESSICK, GEORGE MALLON, NANCY MALLON, LARRY THOMPSON, and KAREN THOMPSON,

Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, RONALD K. STEWART in his official capacity as County Commissioner, PAUL DANISH in his official capacity as County Commissioner, CITY OF LOUISVILLE, THOMAS DAVIDSON in his official capacity as Mayor, CITY OF LAFAYETTE, CAROLYN McINTOSH in her official capacity as Mayor, CITY OF BROOMFIELD, and WILLIAM BERENS, in his official capacity as Mayor,

Defendants.

ORDER and JUDGMENT

(Filed Feb. 15, 2000)

This matter was before the Court on February 2, 2000, for oral argument on defendants' Motions To Dismiss and Motions To Strike. The Court heard the arguments and statements of counsel, and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that defendants' Motions To Dismiss are granted. It is

FURTHER ORDERED that defendants' Motions To Strike are granted. It is

FURTHER ORDERED that to the extent Defendants City of Broomfield And William Berens Motion To Dismiss differs from the other defendants' Motions To Dismiss, the motion is denied. Thereafter the Motion To Dismiss is granted. It is

FURTHER ORDERED that the Complaint and cause of action are dismissed.

DATED at Denver, Colorado, this 15 day of February, 2000.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge
United States District Court

EOD
UNITED STATES DISTRICT COURT
DENVER, COLORADO

FEB 15 2000

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In The

Supreme Court of the United States

ELMER CRIDER, MARYLN CRIDER, LANNY HELMS, MARTHA HELMS, BRUCE GAMBELL, BRIAN MESSICK, LYNETTE MESSICK, GEORGE MALLON, NANCY MALLON, LARRY THOMPSON, and KAREN THOMPSON,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, RONALD K. STEWART in his official capacity as County Commissioner, PAUL DANISH in his official capacity as County Commissioner, CITY OF LOUISVILLE, THOMAS DAVIDSON in his official capacity as Mayor, CITY OF LAFAYETTE, CAROLYN McINTOSH in her official capacity as Mayor, CITY OF BROOMFIELD, and WILLIAM BERENS, in his official capacity as Mayor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS THE WRIT SHOULD BE DENIED 4

I. IT IS WELL-ESTABLISHED THAT NO EQUAL PROTECTION CLAIM IS MADE WHEN DISSIMILAR PROPERTIES ARE TREATED DIFFERENTLY 4

II. THE TENTH CIRCUIT'S FACT-BASED INQUIRY DEMONSTRATES CERTIORARI IS NEITHER APPROPRIATE NOR NECESSARY 8

III. THE TENTH CIRCUIT, LIKE ALL OTHER CIRCUITS, REQUIRES PLAINTIFFS TO ALLEGE FACTS SHOWING THAT SIMILARLY SITUATED PROPERTY WAS TREATED DIFFERENTLY IN ORDER TO STATE AN EQUAL PROTECTION CLAIM 10

IV. PROPERTY OWNERS' EQUAL PROTECTION CLAIM WOULD HAVE BEEN DISMISSED EVEN IF THE SUBDIVISION PROPERTIES AND THE STORAGETEK PROPERTY WERE SIMILARLY SITUATED 12

V. THE PROPERTY OWNERS DID NOT STATE A "VINDICTIVE ACTION" EQUAL PROTECTION CLAIM 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va., 488 U.S. 336 (1989) 8

Anderson v. Douglas County, 4 F.3d 574 (8th Cir. 1993) 11

Brown v. Borough of Mahaffey, Pa., 35 F.3d 846 (3rd Cir. 1994) 10

Brown v. City of Oneonta, New York, 221 F.3d 329 (2nd Cir. 2000) 10

Bryan v. City of Madison, Miss., 213 F.3d 267 (5th Cir. 2000) 10

Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001) 9

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985) 5

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) 5

F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993) 12, 16

Hayes v. Missouri, 120 U.S. 68 (1887) 16

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) 8

Pegram v. Herdrich, 530 U.S. 211 (2000) 7

Plyler v. Doe, 457 U.S. 202 (1982) 5

Sims v. Mulcahy, 902 F.2d 524 (7th Cir. 1990) 10

TABLE OF AUTHORITIES – Continued

Page

Strickland v. Alderman, 74 F.3d 260 (11th Cir. 1996) 11

Tigner v. Texas, 310 U.S. 141 (1940) 5

Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504 (10th Cir. 1998) 10

United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) 12

United States v. Castillo, 140 F.3d 874 (10th Cir. 1998) 13

Vacco v. Quill, 521 U.S. 793 (1997) 4

Village of Willowbrook v. Olech, 528 U.S. 562 (2000) 14, 15

Williams v. Vermont, 472 U.S. 14 (1985) 8

RULES

Fed. R. Civ. P. 12(b)(6) 7

Sup. Ct. R. 10 7

STATEMENT OF THE CASE

The Petitioners (the "Property Owners") own six, ten-acre lots within a residential subdivision (the "Subdivision Properties") in Boulder County, Colorado. Five of the lots are improved with single-family residences, but the Property Owners wish to scrape off their residences and rezone their land for commercial development. In 1998, Boulder County, the City of Louisville, the City of Lafayette, and the City of Broomfield (the "Local Governments") began to develop an Intergovernmental Agreement (the "IGA"). The goals of the Local Governments in entering into the IGA were to prevent urban sprawl and preserve individual rural communities as well as distinct and separate municipalities.

In order to preserve rural areas within the boundaries of the IGA, certain properties, including the Subdivision Properties, were designated "Rural Preservation." Rural Preservation properties remained in the unincorporated area of Boulder County (the "County") and remained zoned Agricultural, which is the County's basic farming and rural residential zone district. The IGA allowed the Property Owners to continue using their properties in the same manner as they had used them prior to the adoption of the IGA and to further develop the Subdivision Properties in accordance with County regulations.

Prior to the adoption of the IGA, the Local Governments notified the Property Owners that the Subdivision Properties may be included in the IGA. Subsequently, the Property Owners appeared at several hearings before the Local Governments and objected to having the Rural

Preservation designation placed upon their properties. As a result of the Property Owners' objections, the County requested that the IGA be modified. Specifically, the County requested that the IGA include a provision that would allow the Property Owners to apply for an increase in density from 1 unit per 10 acres to 1 unit per 4.5 acres. Furthermore, the County negotiated for a provision that required Louisville to use its best efforts to require an undeveloped buffer along the southern side of the Subdivision Properties.

The Local Governments ratified the IGA with the new provisions requested by the County. In addition to the modifications addressing the Property Owners' concerns, the IGA contained a provision which allows the Property Owners to apply for greater density and/or annexation into another municipality.[1] Despite these provisions, the Property Owners have never applied to the County for rezoning or applied to any city for annexation.

Storage Technology Corporation ("StorageTek") owns and operates several industrial buildings located approximately one-half mile south of the Subdivision Properties in the City of Louisville. The StorageTek campus and the Subdivision Properties are separated by an unincorporated 80-acre property owned by StorageTek (the "StorageTek Property"). Unlike the Subdivision

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[1] The Property Owners' Petition for Writ of Certiorari ("Petition") contains a misstatement because it incorrectly indicates that "Paradise Lane cannot be annexed by any of the cities" for 30 years. Petition at 3. The IGA allows annexation if approved through a plan amendment process.

Properties, the StorageTek Property is singly-owned, undeveloped, and not subdivided. The StorageTek Property received no designation under the IGA.

The Property Owners filed suit against the Local Governments in the United States District Court for the District of Colorado. The Property Owners claimed, among other arguments, that the IGA on its face deprived them of their right to equal protection. The Complaint contained no allegations of personal animus or vindictive action by the Local Governments or government officials. Instead, the Property Owners complained that zoning decisions made by city, county, and state officials changed the character of the area. For example, the Property Owners alleged that the construction of a school near the Subdivision Properties obscured their view of the mountains; that an intersection constructed near the Subdivision Properties made the Subdivision Properties too easily accessible; and that a new mall nearly a mile from their properties would generate too much traffic.

The Local Governments filed a motion to dismiss, which was granted by the district court. In ruling that the Property Owners failed to state an equal protection claim, the district court determined that there were many plausible reasons for the distinctions in the IGA, including state and regional interests to preclude increased development, the need to preclude urban sprawl, and preservation of rural areas to prevent traffic at interchanges. Petition at 39a. The district court also found that there was a sufficient distinction between the StorageTek Property and the Subdivision Properties.

The Property Owners appealed to the Tenth Circuit, which upheld the district court's dismissal by a unanimous decision. The Tenth Circuit held that, even when the facts were viewed in a light most favorable to the Property Owners, the Subdivision Properties and the StorageTek Property were not similarly situated and therefore they had failed to state a claim for relief.

REASONS THE WRIT SHOULD BE DENIED

This case is a local zoning dispute which does not belong in federal court and certainly does not belong in the United States Supreme Court. Rather than pursuing the numerous local and state avenues of redress available to them, the Property Owners have attempted to turn a disagreement with comprehensive local land use decisions into a case about civil rights. Both the district court and the Tenth Circuit found that the Property Owners have failed to allege facts which indicate this local dispute warrants attention by the federal courts, and this Court should do the same by denying the Petition.

I. IT IS WELL-ESTABLISHED THAT NO EQUAL PROTECTION CLAIM IS MADE WHEN DISSIMILAR PROPERTIES ARE TREATED DIFFERENTLY

The Equal Protection Clause of the Fourteenth Amendment "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). From early on, this Court has made it clear that "the Constitution does not require things which are different in fact or

opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). When a state or local government treats things differently that obviously are different, the federal courts need not engage in an equal protection analysis.

For example, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 287 n.12 (1990), the petitioners raised the argument that Missouri violated the Equal Protection Clause because it treated incompetent patients differently from competent ones. The petitioners in *Cruzan* relied on the statement by this Court in *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) that the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *Id.* This Court refused to engage in an in-depth factual analysis as to whether, in fact, incompetent persons were similarly situated to competent ones. Instead, the Court stated "[t]he differences between the choice made *by* a competent person to refuse medical treatment, and the choice made *for* an incompetent person by someone else . . . are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which to do not apply to the former class." *Id.* (emphasis in original). As demonstrated by *Cruzan*, considering the obvious differences between things that are alleged to be "similarly situated" is perfectly appropriate.

In this case, the differences between the Subdivision Properties and the StorageTek Property are obvious on the face of the Complaint. Ruling from the bench, the district court stated: "there is a sufficient distinction . . .

between the plaintiffs' property and StorageTek. StorageTek is an employer of many people in the area. They may have need for expansion. Their land is undeveloped . . . " Petition at 39a. Similarly, the Tenth Circuit stated:

> Even taking the facts alleged in the complaint as true and viewing them in the light most favorable to Paradise Lane Owners, we find that Paradise Lane Owners have failed to allege facts sufficient to establish that they are similarly situated to StorageTek. While the properties owned by Paradise Lane Owners and StorageTek both allegedly total eighty acres and are adjacent, that is where the similarity ends. According to Paradise Lane Owner's complaint, StorageTek is a single commercial entity. Paradise Lane Owners, in contrast, are individual owners of residential property. StorageTek owns the single eighty acre lot under consideration as well as an adjacent lot on which it has built a large, industrial campus. Paradise Lane Owners' land is subdivided into six separate, individually owned lots, one lot totaling twenty acres and the other five lots totaling ten acres (with a ten acre lot unoccupied). StorageTek's eighty acre lot is undeveloped. Paradise Lane Owners' lots have been developed into separate private residences occupied by Paradise Lane Owners and their families.

Petition at 6a. As observed by the courts below, the differences between the Subdivision Properties and the StorageTek Property are numerous and readily apparent from the face of the Complaint.

Contrary to the Property Owners' argument, the Tenth Circuit properly applied Fed. R. Civ. P. 12(b)(6) in concluding that the subject properties were not similarly situated. The facts relied upon by the Tenth Circuit were undisputed facts alleged by the Property Owners in their Complaint. "[W]here specific allegations clarify the meaning of broader allegations, they may be used to interpret the complaint as a whole." *Pegram v. Herdrich*, 530 U.S. 211, 230 (2000). Although the Property Owners argue that, given the opportunity, they would present photographs, conduct site visits, and present "land experts" to argue that the properties are similar, none of this evidence would change the immutable facts as alleged in the Complaint and identified by the Tenth Circuit which demonstrate the differences between the properties. Accordingly, neither the district court nor the Tenth Circuit erred in determining that the Property Owners had failed to state facts sufficient to support their equal protection claim.

Even if the Tenth Circuit had misapplied Fed. R. Civ. P. 12(b)(6) in upholding the district court's order of dismissal, it would not be sufficient reason for this court to grant the Petition. The Property Owners do not claim that the Tenth Circuit improperly stated the standard for dismissing a case under Fed. R. Civ. P. 12(b)(6), but only that it "fundamentally misapplied" it. Petition at 15. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Thus, even if the Tenth Circuit did err, the Petition should not be granted.

II. THE TENTH CIRCUIT'S FACT-BASED INQUIRY DEMONSTRATES CERTIORARI IS NEITHER APPROPRIATE NOR NECESSARY

Because this is a case in which the Petitioners were unable to allege facts sufficient to support their equal protection claim, the Tenth Circuit's ruling does not suggest a need for clarification on the issue of similarly situated properties. Neither the district court nor the Tenth Circuit felt it was even a close question as to whether the StorageTek Property and the Subdivision Properties were similarly situated. No record beyond the Complaint itself was developed on the similarities and differences between the properties in question. Accordingly, this Court's decision would be limited to a determination of whether the facts as alleged in the Complaint were sufficient to state a claim that the properties were similar. Such a limited, fact-based determination would do little to guide lower federal courts.

Even if this case provided a broader basis for a decision, nothing in the Petition suggests that this Court could create standards which would provide guidance beyond *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va.*, 488 U.S. 336, 340 n.3 (1989); *Williams v. Vermont*, 472 U.S. 14, 27 (1985); and *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 18 (1988). As demonstrated by these cases and urged by the Property Owners in the Petition, whether one property is similarly situated to another is a fact-based determination which does not lend itself to in-depth legal analysis. As articulated by the Seventh Circuit: "While we have

repeatedly discussed the similarly situated requirement[,] . . . these discussions are rarely extensive and do not provide any magic formula for determining whether someone is similarly situated. This is due, seemingly, to the essentially factual nature of the inquiry. Different factors will be relevant for different types of inquires [sic] – it would be imprudent to turn a common-sense inquiry into a complicated legal one." *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir. 2001). Moreover, the Property Owners fail to point out any decision from any other circuit which is contrary to this Court's prior determinations in this area. The Property Owners admit that "the question is one of fact . . . focusing on the 'relevant' or 'material' factual aspects." Petition at 18.

Because the "similarly situated issue" does not lend itself to any particular rule or criteria, the most the Court could do in this case is reaffirm that determining whether properties are similarly situated is essentially a fact-based inquiry. Such a decision would serve no purpose. The Tenth Circuit's determination was based on the facts alleged in the Complaint. A plaintiff is required to state facts sufficient to state an equal protection claim before being entitled to a hearing. If, as suggested by the Property Owners, the district court was required to hold a hearing under these circumstances, the federal courts would be burdened by an additional procedural step in equal protection cases, putting pressure on an already over-burdened federal judiciary. Thus, there is no reason the Court should grant certiorari in this case.

III. THE TENTH CIRCUIT, LIKE ALL OTHER CIRCUITS, REQUIRES PLAINTIFFS TO ALLEGE FACTS SHOWING THAT SIMILARLY SITUATED PROPERTY WAS TREATED DIFFERENTLY IN ORDER TO STATE AN EQUAL PROTECTION CLAIM

The Tenth Circuit's determination that the Property Owners failed to state facts sufficient to support their equal protection claim was not unique or unusual. In reaching its decision, the Tenth Circuit stated: "To state a valid equal protection claim . . . Paradise Lane Owners must 'allege facts sufficient to establish that [they are] similarly situated' to StorageTek." Petition at 5a (quoting *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998)). The requirement that a plaintiff initially identify a similarly situated group, person, or property is imposed by all of the circuit courts who have addressed this issue. *See Brown v. City of Oneonta, New York*, 221 F.3d 329, 337 (2nd Cir. 2000) (It is necessary to allege the existence of a similarly situated group that was treated differently when pleading a violation of the Equal Protection Clause.); *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 850 (3rd Cir. 1994) ("In order to maintain an equal protection claim . . . the plaintiffs must . . . allege and prove that they received different treatment from other similarly situated individuals or groups."); *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 276 (5th Cir. 2000) (no equal protection claim is stated when a plaintiff fails to allege facts showing similarly situated individuals were treated differently); *Sims v. Mulcahy*, 902 F.2d 524, 538 (7th Cir. 1990) ("In order to establish a *prima facie* case of discrimination violative of the equal protection clause,

[plaintiff] was required to demonstrate that she was treated differently from other similarly situated employees."); *Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993) (a party claiming a violation of equal protection must establish he is similarly situated to others); *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996) (same).

The Property Owners argue that the Tenth Circuit's approach in this case is inconsistent with other lower courts because it allegedly did not consider the facts, or at least the relevant facts, alleged by the Property Owners. The premise of the Property Owners' argument is flawed. The Tenth Circuit specifically identified the undisputed facts that it considered when determining that the Subdivision Properties and the StorageTek Property were dissimilar. *See* Petition at 6a. Therefore, the Property Owners' argument that the Tenth Circuit's decision was contrary to other circuits which consider "the relevant facts" is baseless.

The Property Owners also argue that the Tenth Circuit's approach differed from other circuits because other plaintiffs have brought successful equal protection claims based on land use decisions in other lower courts. Many of these cases are as-applied equal protection claims which have no bearing on the Property Owners' facial challenge to the IGA. Furthermore, the Property Owners fail to identify any standard or rule of law imposed by the Tenth Circuit that was different than those used by other courts. Obviously, the facts alleged by the Property Owners in this case are different than the facts alleged in cases before other lower courts. The Property Owners have shown nothing to suggest that other lower courts

would have acted differently if the facts of this case were presented to them.

IV. PROPERTY OWNERS' EQUAL PROTECTION CLAIM WOULD HAVE BEEN DISMISSED EVEN IF THE SUBDIVISION PROPERTIES AND THE STORAGETEK PROPERTY WERE SIMILARLY SITUATED

The Property Owners' failure to allege facts sufficient to show that their properties were similar to the StorageTek Property was not the only flaw in their equal protection claim. Even if the Property Owners had gotten past this threshold issue, the case still would have been dismissed under the rational basis test. The Property Owners admit that they are not a suspect class which would subject the IGA to strict scrutiny. Thus, the IGA would be analyzed under the rational basis test:

> equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . . [A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification*. . . . Where there are "plausible reasons" for Congress' action, "our inquiry is at an end."

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) (emphasis added) (quoting in part *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). The Tenth Circuit articulated its application of the rational

basis test in *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998).

Both the district court and the Tenth Circuit indicated that a rational basis existed for the distinction between the Subdivision Properties and the StorageTek Property in the IGA. The district court stated:

> in this case, there are certainly many plausible reasons set forth in the IGA for this type of agreement, [sic] we have state interests and regional interests to preclude increased development. I'm looking on page 1 of the IGA; to preclude urban sprawl. There are many other discussions of the need for keeping rural areas to prevent congestion at interchanges. There may in the future be a highway in this area. So throughout the IJA [sic], . . . there are many reasons stated, a number of justifications for the actions. And these do indeed provide a rational basis for IGA's distinctions.

Petition at 39a. Similarly, in the context of its discussion on the Property Owners' substantive due process claim, the Tenth Circuit found that: "[i]n their complaint, Paradise Lane Owners do not allege the absence of a conceivable rational relationship between the IGA and a legitimate governmental objective. . . . We find, therefore, that Paradise Lane Owners failed to allege the lack of a reasonably conceivable rational basis for the IGA." Petition at 6a-7a. As these findings demonstrate, a reversal by this Court would simply result in a dismissal on rational relationship grounds upon remand.

V. THE PROPERTY OWNERS DID NOT STATE A "VINDICTIVE ACTION" EQUAL PROTECTION CLAIM

The Property Owners did not allege facts or even conclusory allegations in their Complaint which support a "vindictive action" equal protection claim. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) does not stand for the proposition that a valid equal protection claim can be made simply by alleging that a governmental action was arbitrary or irrational. Instead, *Olech* requires proof that the cause of the differential treatment was illegitimate animus toward the plaintiff by the defendant.

The plaintiffs in *Olech* asserted that "the Village's demand was *actually motivated by ill will* resulting from the Olechs' previous filing of an unrelated, successful lawsuit against the Village." *Olech*, 528 U.S. at 563 (emphasis added). The Olechs' specific allegations of intent and ill will were essential to the Court's determination. The necessity of an allegation of vindictive action was emphasized by Justice Breyer in his concurring opinion:

> The Solicitor General and the village of Willowbrook have expressed concern lest we interpret the Equal Protection Clause in this case in a way that would transform many ordinary violations . . . into violations of the Constitution. . . . Zoning decisions . . . will often, perhaps almost always, treat one landowner differently from another. . . . This case . . . does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause. This is because the Court of Appeals found that in this case

> respondent had alleged an extra factor as well – a factor that the Court of Appeals called "vindictive action," "illegitimate animus," or "ill will." . . . [T]he presence of that added factor in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.

Olech, 528 U.S. at 565 (Breyer, J. concurring) (citations omitted).

The Property Owners' equal protection claim is not about ill will or vindictiveness. Rather, it is about a zoning determination which they believe is unfair. Their equal protection challenge is a "facial constitutional challenge[ ]" to the IGA which "treats their property differently than the property owned by Storage Technology. . . . " Complaint at 2-3. The Complaint does not allege that the Subdivision Properties were placed in the rural preservation district because of personal animus, but instead allege: "The 'Rural Preservation' designation placed on the Paradise Lane property was a result of bargaining and a political trade-off." Complaint at 15. The Property Owners do not make a single allegation of personal animus or vindictive action by any of the Defendants. In a pleading filed with the district court, the Property Owners admitted they had no credible evidence of personal animus: "*Although not contained in the Complaint because of the present inability to satisfy Rule 11*, the Paradise Lane Owners have heard of statements made by one or more Louisville officials . . . indicating personal dislike for one or more of the Paradise Lane Owners." Plaintiffs' Response To Defendants' Motions To Dismiss at 10 (emphasis added).

In order to make this case sound like a vindictive action case rather than a run-of-the-mill zoning case, the Property Owners argue that improper procedures were used to adopt the IGA. The Property Owners complain that they were "misled" by the Local Governments while negotiations took place. However, nothing in *Olech* suggests that allegations of procedural irregularities in the legislative process give rise to a vindictive action equal protection claim.

The Complaint failed to state any allegation that would indicate that the IGA was the result of an intentional and vindictive action on a part of the Local Governments to deprive the Property Owners of their constitutional rights. Instead, this is a zoning decision about where commercial development should and should not occur. A classification is not violative of equal protection merely because it is "limited in the object to which it is directed or the territory within which it is to operate." *Hayes v. Missouri*, 120 U.S. 68, 71 (1887). "Defining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Beach Communications, Inc.*, 508 U.S. at 315-16 (quotations omitted). Unlike the circumstances in *Olech*, there is nothing in this case to indicate an injustice may have been committed which would warrant review by this Court or give rise to a cognizable equal protection claim.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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